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82-5128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-

82-5128

JAMES MATHIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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TABLE OF CONTENTS

Table of Authorities.....ii, iii

Citations to Opinions Below.....1

Jurisdiction.....1

Constitutional and Statutory Provisions Involved.....2

Question Presented.....2

How the Issue Was Raised Below.....2

Note.....3

Statement of the Case.....3

Reason for Granting the Writ

Petitioner's death sentences were imposed in an arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States where in imposing each death sentence the jury relied on an unconstitutional and unsubstantiated aggravating circumstance.....4

TABLE OF AUTHORITIES

Cases

Bachellar v. Maryland, 397 U.S. 564 (1970).....7

Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978)...7, 8, 9

Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981).....5

Cramer v. United States, 325 U.S. 1 (1945).....7

Eddings v. Oklahoma, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)....8

Furman v. Georgia, 408 U.S. 238 (1972).....7

Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).....5

Godfrey v. Georgia, 446 U.S. 420 (1980).....5, 6

Green v. State, 246 Ga. 598, 277 S.E.2d 475 (1980).....5

Gregg v. Georgia, 428 U.S. 153 (1976).....6

Gregory v. Chicago, 394 U.S. 111 (1969).....7

Lockett v. Ohio, 438 U.S. 586 (1978).....8, 10

Mathis v. State, ___Ga. ___, No. 38308 (Ga.1982).....1

Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).....8

Roberts v. Louisiana, 428 U.S. 325 (1976).....9

Street v. New York, 394 U.S. 576 (1969).....7

Stromberg v. California, 283 U.S. 359 (1931).....7, 9

Terminiello v. Chicago, 337 U.S. 1 (1949).....7

Thomas v. Collins, 323 U.S. 516 (1945).....7

Williams v. North Carolina, 317 U.S. 287 (1942).....7

Woodson v. North Carolina, 428 U.S. 280 (1976).....9

Zant v. Stephens, 631 F.2d 397, Modified on panel rehearing, 648 F.2d 446, cert. granted, 50 U.S.L.W. 3244 (Oct. 5, 1981), Question certified to the Supreme Court of Georgia, 72 L.Ed.2d 222 (1982).....3, 4

Constitutional Amendments

EIGHTH.....2, 6

FOURTEENTH.....2, 6

Statutes

28 U.S.C. §1257.....1

Georgia Code Ann. §26-1101.....2

Georgia Code Ann. §26-3102.....2

Georgia Code Ann. §27-2534.1.....2, 3, 4, 6, 8

Georgia Code Ann. §27-2537.....2

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner, James Mathis, prays that a writ of certiorari be issued to review the judgement of the Supreme Court of Georgia entered on May 18, 1982, rehearing denied May 31, 1982.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Georgia is set out in ___Ga.___, No. 38308 (Ga. 1982), and is set out in Appendix A; the denial of the motion for rehearing is set out in Appendix B.

JURISDICTION

Jurisdiction of this Court is invcked under 28 U.S.C. §1257 (3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C:

Ga. Code Ann. §26-1101

Ga. Code Ann. §26-3102

Ga. Code Ann. §27-2534.1

Ga. Code Ann. §27-2537

QUESTION PRESENTED

Whether Petitioner's death sentences were imposed in an arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States where in imposing each death sentence the jury relied on an unconstitutional and unsubstantiated aggravating circumstance?

HOW THE ISSUES WERE RAISED BELOW

The constitutional issues in the question presented were raised on appeal to the Supreme Court of Georgia which affirmed Petitioner's sentences of death.

NOTE

Petitioner raises an issue already before this Court in Zant v. Stephens, 631 F.2d 397, Modified on panel rehearing, 648 F.2d 446, cert. granted, 50 U.S.L.W. 3244 (Oct. 5, 1981), Question certified to the Supreme Court of Georgia, 72 L.Ed.2d 222 (1982). The issue is whether a death sentence is constitutionally impaired by the invalidity of one of the aggravating circumstances found by the jury. Zant v. Stephens is still undecided pending the answer to a question certified to the Georgia Supreme Court.

STATEMENT OF THE CASE

On June 2, 1981, Petitioner was convicted of the murders of Ruby Washington and J.L. Washington in the Superior Court of Douglas County, Georgia. At the sentencing phase of the bifurcated trial the jury found three aggravating circumstances as the basis for imposing the death penalty for each murder. Subsequently on review the Georgia Supreme Court found that in imposing each death sentence the jury had relied on an aggravating circumstance that was unconstitutional and unsupported by the evidence. Notwithstanding the invalidity of aggravating circumstances used by the jury, the Georgia Supreme Court affirmed Petitioner's sentences of death.

The jury found the following aggravating circumstances as the basis for imposing the death penalty for the murder of Ruby Washington: 1) The murder of Ruby Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, the armed robbery of Ruby Washington, Ga. Code Ann. §27-2534.1 b(2). 2) The murder of Ruby Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, the kidnapping with bodily

injury of Ruby Washington, Ga. Code Ann. §27-2534.1 b(2).

3. The murder of Ruby Washington was outrageously vile, horrible, and inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim, Ruby Washington, Ga. Code Ann. §27-2534.1 b(7). The Georgia Supreme Court has struck the first of these.

The jury found the following aggravating circumstances as the basis for imposing the death penalty for the murder of J.L. Washington: 1) The murder of J.L. Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, the armed robbery of J.L. Washington, Ga. Code Ann. §27-2534.1 b(2). 2) The murder of J.L. Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, the kidnapping with bodily injury of J.L. Washington, Ga. Code Ann. §27-2534.1 b(2). 3) The murder of J.L. Washington was outrageously vile, horrible, and inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim, J.L. Washington, Ga. Code Ann. §27-2534.1 b(7). The Georgia Supreme Court has struck the last of these.

In its mandatory sentence review on May 18, 1982,[1] the

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1. The Georgia Supreme Court affirmed Petitioner's death sentences two weeks after this Court, on May 3, 1982, in connection with Zant v. Stephens, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446, cert. granted, 50 U.S.L.W. 3244 (Oct. 5, 1981), Question certified to the Supreme Court of Georgia, 72 L.Ed. 2d 222 (1982), certified the following question to the Georgia Supreme Court: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?"

The Georgia Supreme Court thus had notice, at the time of its decision in Petitioner's case, that this issue was before this Court. On May 28, 1982, Petitioner filed a motion for rehearing in the Supreme Court of Georgia calling that court's attention to the status of Zant v. Stephens. The motion was denied.

Georgia Supreme Court ruled that the jury had not had sufficient evidence to find either that "the murder of Ruby Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, the armed robbery of Ruby Washington," or that "the murder of J.L. Washington was outrageously vile, horrible, and inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim."[2] (Appendix A, p. 9). As has been its practice in such cases,[3] the Georgia Supreme Court affirmed Petitioner's death sentences nonetheless.

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2. In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court ruled that a narrow construction must be placed upon this aggravating circumstance, so as to provide a rational basis for distinguishing cases in which the death penalty should be imposed from cases in which it should not. The plurality stated that it has been the responsibility of the Georgia Supreme Court to review each finding of this aggravating circumstance, to determine whether the evidence suggests that the jury has interpreted the aggravating circumstance in narrow, constitutionally permissible terms.

3. The Georgia Supreme Court in its opinion in Petitioner's case cited Cervi v. State, 248 Ga. 325, 282 S.E.2d 629 (1981), Green v. State, 246 Ga. 598, 277 S.E.2d 475 (1980), and Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979) to demonstrate that affirming death sentences after finding one of the underlying aggravating circumstances invalid has been the established practice of the court. (Appendix A p. 10)

REASON FOR GRANTING THE WRIT

PETITIONER'S DEATH SENTENCES WERE IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHERE IN IMPOSING EACH DEATH SENTENCE THE JURY RELIED ON AN UNCONSTITUTIONAL AND UNSUBSTANTIATED AGGRAVATING CIRCUMSTANCE.

Petitioner's sentence of death for the murder of Ruby Washington was based in part on the jury finding that "the murder of Ruby Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, the armed robbery of Ruby Washington." There was no evidence to support such a finding. In Gregg v. Georgia, 428 U.S. 153, 190 (1976), the plurality of this court stated, "accurate sentencing information is an essential prerequisite to a reasoned determination of whether a defendant should live or die." The Eighth Amendment cannot tolerate death sentences based on faulty conclusions and mistakes.

Petitioner's other death sentence, for the murder of J.L. Washington, was based in part on the jury finding that "the murder of J.L. Washington was outrageously vile, horrible, and inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim. In Godfrey v. Georgia, 446 U.S. 420 (1980) this Court ruled that this aggravating circumstance, Ga. Code Ann. §27-2534.1 b(7), must be used by juries in such a way that it provides a specific, rational basis for distinguishing cases in which the death penalty should be imposed from cases in which it should not. A loose construction of this aggravating circumstance leads juries to arbitrary and

capricious sentences of death, in violation of Furman v. Georgia, 408 U.S. 238 (1972). At Petitioner's trial there was no evidence offered that provided the jury with a rational basis for applying this aggravating circumstance to the murder of J.L. Washington. The jury's use of this aggravating circumstance in the case of the murder of J.L. Washington was unconstitutionally arbitrary, and the Georgia Supreme Court struck it.

These infirmities in Petitioner's sentences of death are not cured, as the Georgia Supreme Court contends (Appendix A, p. 10), by the presence of other, valid, aggravating circumstances in the jury's verdict. In affirming Petitioner's death sentences the Georgia Supreme Court violated the fundamental due process principle of Stromberg v. California, 283 U.S. 359 (1931). A jury verdict in criminal case cannot stand if it may be based on valid grounds, and maybe on invalid grounds, and it is impossible to determine upon which grounds the jury relied. This principle has been applied broadly and consistently by this Court, see, e.g., Williams v. North Carolina, 317 U.S. 287 (1942), Thomas v. Collins, 323 U.S. 516 (1945), Cramer v. United States, 325 U.S. 1 (1945), Terminiello v. Chicago, 337 U.S. 1 (1949), Yates v. United States, 354 U.S. 298 (1957), Gregory v. Chicago, 394 U.S. 111 (1969), Street v. New York, 394 U.S. 576 (1969), Bachellar v.Maryland, 397 U.S. 564 (1970). It applies specifically when one of the grounds relied upon by the jury is unsupported by the evidence. Cramer v. United States, 325 U.S. 1 (1945).

It cannot now be determined how heavily the jury in Petitioner's case relied upon invalid aggravating circumstances in imposing Petitioner's sentences of death. A finding of one or more aggravating circumstances never requires a jury in Georgia to impose capital punishment. Bowen v. State, 241 Ga. 492, 246

S.E.2d 322 (1978). In Petitioner's case the prosecutor recognized that the jury still could recommend mercy after finding aggravating circumstances, and he emphasized in his closing argument to the jury the cumulative effect of the three aggravating circumstances he was asking the jury to find.

> All three of those statutory aggravating circumstances will support the death sentence for this defendant as to the murder of J.L. Washington. And the State respectfully urges you to find not one and not two but all three.

Under Georgia law, Ga. Code Ann. §27-2534.1, and under the constitutional requirements of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the sentencing jury in a capital case must consider all relevant mitigating circumstances before deciding whether to impose the death penalty. In light of mitigating circumstances the jury can recommend mercy even if it finds several aggravating circumstances to exist.

In Georgia if only one juror votes against imposing the death penalty, the death penalty cannot be imposed. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976). A single juror's evaluation of aggravating and mitigating curcumstances may thus determine the outcome.

The jury's balancing of aggravating and mitigating circumstances is profoundly complex, involving countless variables including community values and each juror's personal predilections; the process defies simple analysis. Speculation over whether a jury in a particular case under altered circumstances might have imposed the death penalty is useless. Such speculation is more irrational in capital sentencing decisions than it is in guilt or innocence decisions. In a guilt or innocence decision the jury must find specific elements in order to reach a guilty verdict. There is no single, defined

process for jury deliberation reaching a sentence of death.

In its review of Petitioner's case the Georgia Supreme Court ignored the jury's consideration of mitigating circumstances, holding that since the jury had found some valid aggravating circumstances, the death sentences were proper. If it is the position of the Georgia Supreme Court that the jury necessarily would have sentenced Petitioner to death on finding only the valid aggravating circumstances, that position contradicts established Georgia law. Bowen v. State, 241 Ga. 492, 246 S.E. 2d 322 (1978). Furthermore, a law that would make death sentences mandatory when aggravating circumstances exist would violate the constitutional prohibition of mandatory death sentences for specific crimes. Woodson v. North Carolina, 428 U.S. 280 (1976), Roberts v. Louisiana, 428 U.S. 325 (1976).

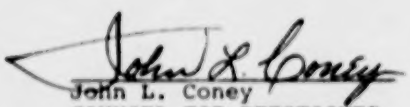
This Court upheld the constitutionality of the Georgia capital sentencing law on the assumption that the Georgia Supreme Court would review each death sentence to determine "whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor." Gregg v. Georgia, 428 U.S. 153, 204 (1976). Each aggravating circumstance mistakenly "found" (assumed) by Petitioner's jury was unquestionably an "arbitrary factor" influencing Petitioner's sentence of death. It follows that the Georgia Supreme Court's review of Petitioner's case could not have complied with the Georgia law as this Court upheld it in Gregg.

Petitioner was given two sentences of death in part because of unconstitutional findings by the jury. The due process principle of Stromberg v. California, 283 U.S. 359 (1931), requires that criminal convictions based in part on invalid grounds be vacated. The right to due process of law applies not only to the process of criminal conviction, but with

even greater force to the process of imposing a sentence of death. "The qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978).

WHEREFORE, for the reasons shown, a writ of certiorari should issue to review the judgement of the Supreme Court of Georgia.

Respectfully submitted,



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APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

In the Supreme Court of Georgia

Decided: MAY 18 1982

38308. MATHIS v. THE STATE.

MARSHALL, Justice.

The defendant was indicted on two counts of murder, two counts of kidnapping, two counts of armed robbery and one count of rape. He was convicted on all counts except the rape charge. The jury returned a verdict at the sentencing phase finding three aggravating circumstances: that each murder was committed during the commission of armed robbery; that each was committed during the commission of kidnapping; and that the murders were outrageously and wantonly vile, etc. Defendant was sentenced to death on each of the murder convictions, life on each of the kidnapping convictions and 20 years each on the armed-robbery convictions.

The victims were an elderly couple who lived in the same housing authority complex in which the defendant's sister lived. The defendant had Thanksgiving dinner with his sister. After dinner, the sister left the room for a short time and when she returned the defendant was gone, whereupon she looked out of the window and saw him in the rear seat of the victim's car as it drove out of the complex. The victims intended to have a late Thanksgiving dinner with one of their children, which was in the same direction as the defendant's home. When the victims were found in a wooded area, it was in the opposite direction from their intended route. The defendant was identified as having solicited a ride at a beer store about a mile from where the victims were found. The male victim's knife and pistol were recovered and identified as having been acquired from the defendant. Further facts will be related where necessary to an understanding of the enumeration of error.

APPENDIX A

1. Enumerations of error 1, 2 and 6 contend that the trial court erred in denying the defendant's motion for individual sequestered voir dire, sequestered voir dire by panels and by requiring general questions to be asked to the entire panel rather than repeating the same question to each individual juror.

"'Code Ann. § 59-705 gives defense counsel the right to examine jurors individually after the usual voir dire questions have been put by the trial court to the jury as a panel. The right does not encompass isolated examination. The single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination. The control of the pursuit of such determination is within the sound legal discretion of the trial court, and only in the event of manifest abuse will it be upset upon review.' Whitlock v. State, 230 Ga. 700, 705 (198 SE2d 865) (1973). See also, Finney v. State, 242 Ga. 582 (250 SE2d 388) (1978)." Messer v. State, 247 Ga. 316 (5) (276 SE2d 15) (1981).

In this case, the individual voir dire by the defendant's counsel covers some 200 pages in the transcript. We can not say that he was unduly restrained in his individual questioning of the jurors nor has he shown any prejudice resulting from the procedure used here or abuse of discretion. Whitlock v. State, supra.

2. Enumeration of error 3 contends that the trial court erred in denying the defendant's motion to swear and sequester all state's witnesses prior to the beginning of the trial.

Code § 38-1703 provides: "In all cases either party shall have the right to have the witnesses of the other party examined out of the hearing of each other. The court

APPENDIX A

shall take proper care to effect this object as far as practicable and convenient, but no mere irregularity shall exclude the witness." Thus we see that the rule provides only that witnesses be examined out of the hearing of each other, and there is no requirement that prospective witnesses remain free of other contact or communications. In a trial that is expected to last several days, it would not be "practicable and convenient" to require all witnesses to be sworn and sequestered for a long period of time, as juries are segregated from all outside influences. See Byrd v. Brand, 140 Ga. App. 135 (4) (230 SE2d 113) (1976).

There is no contention here that any witness violated the rule of sequestration nor is there any contention that the defendant was harmed by the ruling of the trial court. We find no merit in this enumeration.

3. Enumerations 4 and 5 contend that the trial court erred in allowing the sheriff to remain in the courtroom after the rule of sequestration had been invoked, and thereafter not requiring him to testify first.

Absent a showing of an abuse of discretion, it is not error to allow the chief investigating officer to remain in the courtroom or to not require him to testify first. Davis v. State, 242 Ga. 901 (3) (252 SE2d 443) (1979).

4. Enumeration of error 7 contends that the trial court erred in disqualifying a juror under Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968). The panel was asked: "Are you conscientiously opposed to the infliction of capital punishment? Are you so opposed to capital punishment that you would vote against the death penalty regardless of the facts and circumstances that might emerge in the course of these proceedings? Juror: Yes, Sir. The court: Would you vote against it regardless of what the facts and circumstances are? Juror: Yes, Sir."

APPENDIX A

The prospective juror was clearly disqualified, and the trial court did not err in excusing him. See Ruffin v. State, 243 Ga. 95 (3) (252 SE2d 472) (1979), and compare Blankenship v. State, 247 Ga. 590 (4) (277 SE2d 505) (1981), where the answers were ambiguous.

5. Enumerations of error 8 and 9 contend that it was error to deny the defendant's motions for directed verdict as to the kidnapping charges and the armed-robbery charges. There was evidence presented that the defendant was in the car with the victims when they left the premises where they lived; that they were seen preparing to turn left onto the highway leading to their daughter's home; and that the victims and their car were found in the opposite direction from where they were last seen and from their intended route. There was also evidence that the defendant sold property belonging to the male victim. Additionally, there was the defendant's admission to a fellow cellmate admitting these offenses. The evidence being sufficient to submit these issues to a jury, there is no merit in these contentions. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

6. Enumeration of error 10 objects to the trial court's charge on alibi. The defendant testified that the victims let him out of the car at the C & R Grocery Store and that he stayed there about an hour and a half before he got a ride home. This would raise an issue of the defendant's presence at the scene of the crime. Also, the charge was favorable to the defendant, and he can not now complain. Hance v. State, 245 Ga. 856 (4) (268 SE2d 339) (1980).

7. Enumeration of error 11 complains of the charge on confessions. The defendant argues that, at most, his statement to the interrogating officer would be considered as contradictory or incriminating.

APPENDIX A

The defendant made statements to Sammy Owensby, a cellmate, admitting both killings and the rape of the female victim. The statements did not contain anything exculpatory, and it is not necessary that the inculpatory statements be made to a law enforcement officer to warrant a charge on confessions. Johnson v. State, 242 Ga. 822 (1) (251 SE2d 563) (1979); Bonds v. State, 232 Ga. 694 (3) (208 SE2d 561) (1974). There is no merit in this contention.

8. Enumeration of error 12 complains of the charge on robbery by intimidation. Robbery by intimidation being a lesser included offense of armed robbery, and absent an objection, it is not error to charge a lesser included offense. Holcomb v. State, 230 Ga. 525 (198 SE2d 179) (1973). In the present case, when asked if there was any objection to charging on robbery by intimidation, counsel stated: "I am not either excepting to or requesting such a charge. The court asked me if I felt it was in the case, and I do not under the evidence, but it's up to the court to make that determination about the charge." After the jury was charged, counsel was again asked if he had any objection to this charge, and he replied, "No." We find no merit in this enumeration of error. See Jackson v. State, 246 Ga. 459 (271 SE2d 855) (1980).

9. Enumerations of error 22 and 23 contend that the trial court erred in overruling the defendant's motion for new trial and in entering judgment on the verdict. We have reviewed the evidence, and find that it amply supports the verdict beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307, supra. There is no merit in these enumerations of error. Enumerations of error 13 through 21 -- complaining of admitting former convictions, allowing the sheriff to testify, and the charge on aggravating circumstance, all of the sentencing phase of the trial -- will be dealt with in the sentence review.

APPENDIX A

SENTENCE REVIEW

As mandated by the statute, Georgia Law 1973, pp. 159, 165 (Code Ann. § 27-2537), we have reviewed the transcript and record in this case as we have in all prior cases under this statute. We find that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

10. In his enumerations 13-16, the appellant contends that it was error for the trial court to admit over objection prior convictions of the appellant in aggravation during the sentencing phase of the trial. He argues that: Even though the prior convictions were correctly certified and showed upon their face that the defendant therein was represented by counsel, each case was a plea of guilty, and the state did not prove as to each case that the defendant knowingly and intelligently entered his plea of guilty. We do not agree. The convictions were properly certified, and showed upon their face that counsel represented the appellant at the prior cases and therefore they were properly introduced in evidence before the court. See Loper v. Beto, 405 U. S. 473 (92 SC 1014, 31 LE2d 374). We decline to place the burden upon the state to go behind each plea of guilty, regular upon its face, where counsel for appellant is listed, and prove the voluntariness of the plea. No evidence was entered by the appellant that these pleas were involuntarily tendered, and he makes no argument other than the contention that they were involuntary. There is no merit in this enumeration.

11. During the sentencing phase of the trial, the sheriff testified over objection as to his investigation of a 1970 crime involving the appellant. The appellant in his seventeenth enumeration of error argues that the

APPENDIX A

trial court erred in admitting this testimony in that the evidence of the 1970 conviction was improperly before the court. Having already held that the convictions were properly before the court, we find no merit in this enumeration. Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980).

12. The jury found the following aggravating circumstances beyond a reasonable doubt: (1) as to the murder of J. L. Washington, (a) the murder of J. L. Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, the armed robbery of J. L. Washington, (b) the murder of J. L. Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, kidnapping with bodily injury of J. L. Washington (Code Ann. § 27-2534.1 (b) (2)); (c) the murder of J. L. Washington was outrageously and wantonly vile, horrible, and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim, J. L. Washington. Code Ann. § 27-2534.1 (b) (7); (2) as to the murder of Ruby Washington: (a) the murder of Ruby Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery of Ruby Washington; (b) the murder of Ruby Washington was committed while the defendant was engaged in the commission of another capital felony, to wit, the kidnapping with bodily injury of Ruby Washington (Code Ann. § 27-2534.1 (b) (2)); and (c) the murder of Ruby Washington was outrageously and wantonly vile, horrible, and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim, Ruby Washington.

The appellant, in enumerations of error numbers 18, 19, 20 and 21, argues that the trial court erred in submitting to the jury certain of the aggravating circumstances and that the state had not proven during the trial of the case these aggravating circumstances.

As to the murder of J. L. Washington, this court finds that the jury determination that the murder was committed while in the commission of an armed robbery and kidnapping with bodily injury was supported by the evidence, and a trier of fact could have found, taking the evidence most favorable to the verdict, these aggravating circumstances beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307, supra.

As to the murder of Ruby Washington, this court finds that under the evidence a trier of fact could have found beyond a reasonable doubt, taking the evidence in a light most favorable to the verdict, that the murder was committed while the defendant was engaged in another capital felony, to wit, the kidnapping with bodily injury of Ruby Washington, and that the murder of Ruby Washington was outrageously and wantonly vile, horrible, and inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim, Ruby Washington.

In that the sentence of death in this case imposed for the murder of Ruby Washington rests partially upon a finding of the aggravating circumstance set forth in Code Ann. § 27-2534.1 (b) (7), the evidence in this case revealed that the victim, Ruby Washington, was found in a state of partial nudity in that the underwear was pulled down towards the feet and the sweater and brassiere had been pulled upwards so that the lower half of the left breast was exposed. Vegetable debris consisting of

leaves and pine straw were found in her clothing. The victim had suffered two gunshot wounds to the head, four small stab wounds to the left chest centered roughly 18 inches below the top of the head in the fold underneath the left breast. The left hand revealed a gunshot wound to the thumb, there were abrasions found under the knee, and there were three lacerations to the scalp indicating having been struck with a blunt instrument. Five ribs on either side of the sternum had been fractured and three of the four stab wounds had penetrated the heart. The cause of death was a combination of gunshot wounds to the head and stab wounds to the chest, and the victim had been stabbed before she was shot.

The state's evidence clearly demonstrates that the victim, Ruby Washington, suffered serious physical abuse prior to death. We therefore hold that, in the present case, the jury was authorized to find consistently with the United States Supreme Court's holding in Godfrey v. Georgia, 446 U. S. 420 (100 SC 1759, 64 LE2d 398) (1980), and beyond a reasonable doubt, that the appellant's murder of Ruby Washington was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture and depravity of mind. "Torture," as the term is used in the statute, occurs when the victim is subjected to serious physical abuse prior to death. The victim in this case had been stabbed several times about the chest underneath her breast, and then shot, all occurring after the defendant had shot and robbed her husband in her presence. Hance v. State, supra.

This court agrees with the appellant that there was insufficient evidence to show that the appellant committed the murder of Ruby Washington while engaged in the armed robbery of Ruby Washington, and further, while

not enumerated as error, this court finds that the evidence does not support a finding of Code Ann. § 27-2534.1 (b) (7) as to the murder of J. L. Washington. However, we need not decide whether the death penalties imposed in this case must be set aside on these grounds. Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not taint the proceeding so as to invalidate the other aggravating circumstances found in the sentence of death based thereon. Cervi v. State, 248 Ga. 325 (282 SE2d 629) (1981); Green v. State, 246 Ga. 598 (272 SE2d 475) (1980); Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979).

13. Under our obligation to independently review the record as mandated by the Unified Appeal Procedure, this court has found one addressable error not dealt with above or set out in the appellant's enumerations of error. The state alleged as its aggravating circumstances as to the death of both victims that the murders occurred while the appellant was engaged in another capital felony, to wit, kidnapping with bodily injury. The trial court, during the guilt-innocence phase of the trial, charged the jury as to the definition of simple kidnapping, which is not a capital felony. The appellant was found guilty beyond a reasonable doubt of simple kidnapping. However, during the sentencing phase of the trial, the court did not repeat the instruction as to simple kidnapping. The jury returned a finding of Code Ann. § 27-2534.1 (b) (2), as set out above. While this is not good practice, we find it not to be reversible error. The jury had been correctly charged, and found that the defendant had committed the murders while engaged in kidnapping both victims. Therefore, we must assume, and the record supports the view, that the jury knew the definition of

APPENDIX A

simple kidnapping. Code Ann. § 26-1311 defines capital kidnapping as simple kidnapping where the person kidnapped "shall have received bodily injury." Therefore, by charging the jury the aggravating circumstance of kidnapping with bodily injury, the court, for all intents and purposes, gave a proper charge as to kidnapping with bodily injury. Furthermore, the evidence supports beyond a reasonable doubt that the victims were killed while the appellant was engaged in the capital offense of kidnapping with bodily injury.

14. We find that the evidence supports beyond a reasonable doubt a finding that the appellant intentionally killed the victims. Jackson v. Virginia, supra.

15. We have reviewed the instructions given by the court during the sentencing phase of the trial and find them not to be subject to the defects dealt with in Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977), or in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the similar following cases listed in the appendix support the affirmance of the death penalty.

This was a brutal killing of two victims, one of whom was robbed. Both victims were kidnapped and received bodily injury. The 11 cases in which the death penalty was imposed support the death penalty in the instant case. All of these cases involve the deliberate, unprovoked killing of a robbery and/or kidnap victim, and thus show the willingness of the juries to give the death penalty under these circumstances. The appellant's

APPENDIX A

sentence to death for murder in two counts is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

APPENDIX A

38308. MATHIS v. THE STATE.

APPENDIX.

Stanley v. State, 240 Ga. 341 (241 SE2d 173) (1977); Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978); Potts v. State, 241 Ga. 67 (243 SE2d 510) (1978); Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1979); Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979); Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979); Tucker v. State, 245 Ga. 68 (263 SE2d 109) (1979); Justus v. State, 247 Ga. 276 (276 SE2d 242) (1981); High v. State, 247 Ga. 289 (276 SE2d 5) (1981); Brown v. State, 247 Ga. 298 (275 SE2d 52) (1981); Cervi v. State, 248 Ga. 325 (282 SE2d 629) (1981).

APPENDIX A

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 6/2/82

The motion for a rehearing was denied today:

Case No. 38308, Mathis v. The State

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX B

APPENDIX C

STATUTES INVOLVED

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 26-3102

Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict Includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

Georgia Code Annotated Section 27-2534.1

Mitigating and aggravating circumstances; death penalty.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(9) The offense of murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

Georgia Code Annotated Section 27-2537

Review of death sentences.

a) Whenever the death penalty is imposed, and upon the judgement becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgement, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

c) With regard to the sentence, the court shall determine:

1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

2) Whether in cases other than treason or aircraft hijacking, the evidence supports the jury's finding of statutory aggravating circumstance as enumerated in Code Section 27-2534.1 (b), and

3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

d) Both the defendant and the State shall have the right to submit briefs within

the time provided by the court, and to present oral argument to the court.

e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1) Affirm the sentence of death; or

2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

g) The court shall be authorized to employ all appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 27th day of July, 1982.

John L. Coney

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